

IN THE SUPREME COURT OF MISSOURI

No. SC86233

**STATE OF MISSOURI ex rel. THE SCHOOL DISTRICT
OF KANSAS CITY, MISSOURI, et al.**

Relators,

v.

The Honorable J.D. WILLIAMSON, JR.,

Respondent.

**BRIEF AMICUS CURIAE OF
ASSOCIATION OF QUALITY CHARTER SCHOOLS**

Charles W. Hatfield Mo. Bar #40363
STINSON MORRISON HECKER LLP
230 West McCarty St.
Jefferson City, MO 65101
Telephone: (573) 636-6263
Facsimile: (573) 636-6231

Jennifer J. Coleman Mo. Bar #52426
STINSON MORRISON HECKER LLP
1201 Walnut, Suite 2800
Kansas City, Missouri 64106-2150
Telephone: (816) 842-8600
Facsimile: (816) 691-3495

*Attorneys for Amicus Curiae
Association of Quality Charter Schools*

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INTEREST OF AMICUS CURIAE¹

The Association of Quality Charter Schools ("Quality") is an unincorporated association of charter schools and concerned individuals committed to the preservation and promotion of the Charter school movement in Missouri and standards which insure quality Charter schools.

Charter schools are an important part of Missouri's educational system, particularly in urban areas. They present an important educational alternative for children, parents and teachers. In 1998, the Missouri General Assembly adopted monumental changes to the State's education system in general and urban schools in particular. Senate Bill 781. (L. 1998, S.B. No. 781).²

An integral component of the political compromise that became SB 781 was the establishment – for the first time in the history of Missouri – of Charter Schools within the St. Louis and Kansas City public school districts. See § 160.400 RSMo (2000), et seq.

Charter schools are specifically designed to be "schools of choice" exempt from the laws and rules relating to schools, governing boards and school districts, except for

¹ Pursuant to Rule 84.05(f)(2), the parties have consented to the filing of this Brief.

² Among other things, Senate Bill 781 represented an important step in the state's historic settlement of its desegregation cases. See 163.035 RSMo (2000). All statutory references are to the 2000 statutes unless otherwise noted.

charter school laws and regulations. § 160.405.5(3) RSMo. During fiscal year 2003 alone, nearly 10,000 Missouri students had the privilege of being educated by charter schools. Claire McCaskill, Performance Audit: Department of Elementary and Secondary Education's Charter School Oversight, Report No. 2004-59, p. 3, www.auditor.mo.gov (August 25, 2004). These 10,000 students attended one of the 25 area charter schools established in the Kansas City and St. Louis areas.⁴ Id. at 20. Eight institutions sponsor these 25 charter schools, some of them sponsoring up to ten charter schools while others only sponsor one. Id.

Charter schools cannot operate without sponsors. § 160.405 RSMo. This Court's decision concerning the relationship between a sponsor and a charter school could therefore have a serious impact on the ability of charter schools to operate, the ability of thousands of students to attend those schools, as well as the teachers and parents who benefit from the operation of charter schools.

Because Amicus Quality includes charter schools as well as individuals concerned with the success of the charter school movement, amicus has a vested interest in ensuring that charter schools maintain the right to judicial review of sponsors' decisions concerning approval, revocation and renewal. There are only a limited number of sponsors to which a charter school may apply.⁵ If these sponsors are allowed to deny, or

⁴ A 26th charter school was added after the fiscal year 2003 ended.

⁵ Allowable sponsors consist of the Kansas City or St. Louis school districts, a community college or public 4-year college/university. The college/university must

fail to renew, a charter application on any or no basis, without any type of review available, the charter school movement could be quickly wiped out, frustrating and perhaps ending the Legislature's establishment of charter schools in Missouri.

The exercise of such unchecked authority to deny charter school applications could lead to arbitrary, capricious, illegal or even discriminatory action without any recourse. The legislature intended to establish charter schools as a viable alternative for students in urban areas. The legislature has also established a system for review of the decisions of the government when those decisions affect the rights, duties and privileges of the citizens. Neither of these important concepts should be abandoned.

be located in, or adjacent to the county in which the district is located, or provide educational programs meeting regional or national standards of accreditation to any part of the district. § 160.400.2 RSMo.

ARGUMENT

I. THE TRIAL COURT HAS THE AUTHORITY TO EXERCISE JURISDICTION OVER THIS MATTER AS A NONCONTESTED CASE UNDER § 536.150 RSMO

The Parties' briefs place great emphasis on the issue of whether KCMSD's decision with regard to Westport was a decision to revoke a charter or a decision not to renew Westport's charter. See Relators' Substitute Brief Seeking a Writ of Prohibition ("KCMSD's Brief") at 33-34; Response of Plaintiff, Individually and on Behalf of the Honorable J.D. Williamson to Petition in Prohibition ("Respondent's Brief") at 15-16, 25, 28. In doing so, both parties fail to emphasize the fact that either decision is reviewable by the Courts under Chapter 536.

But KCMSD's brief goes even further and advocates a position that would deprive the trial courts of jurisdiction to review charter application decisions under any circumstances. In doing so, KCMSD misstates the law. KCMSD argues that judicial review of a non-renewal decision is prohibited because non-renewal decisions reside in some sort of legal purgatory -- neither a contested nor a noncontested case under the Missouri Administrative Procedure and Rules Act ("MAPA"). However, the plain language of Chapter 536.⁶, Missouri case law, and the overriding principles of equity,

⁶ Although neither party raises the issue, Section 160.405 RSMo, under its own terms, may be intended to provide for review under Chapter 536. Under subsection 4 of §

mandate a different conclusion. The trial court has jurisdiction to review KCMSD's decision.

A. KCMSD's Position Is Erroneous

KCMSD argues that Westport has absolutely no right to judicial review of the district's decision not to renew Westport's charter because KCMSD's decision enjoys some special status as neither a contested or noncontested case under MAPA. (KCMSD's Brief at 32). KCMSD alleges three basis for its "noncontested case" argument: (1) the

160.405 RSMo: "Any disapproval of a charter pursuant to subsection 3 of this section shall be subject to judicial review pursuant to chapter 536, RSMo." Mo. St. § 160.405.4 (emphasis added). Subsection 3 provides: "If a charter is approved by a sponsor, it shall be submitted to the state board of education which may, within forty-five days, disapprove the granting of the charter. The state board of education may disapprove a charter only on grounds that the application fails to meet the requirements of sections 160.400 to 160.420. " § 160.405.3 RSMo. Arguably, the language in subsection 4 applies not only to disapprovals of charters by the state board, but also to decisions of the sponsors. While this language is admittedly ambiguous, if subsection 4 does apply to non-approval of charters by sponsors, judicial review under Chapter 536 is warranted. If the language in subsection 4 does not cover the sponsor's decision, then this is a noncontested case under § 536.150 RSMo. Either way, judicial review is available.

decision to renew or not renew a charter is completely at the will of the proposed sponsor, and as such, no right, duty or privilege of Westport was involved in KCMSD's determination; (2) there has been no controversy as to whether KCMSD followed the required procedures for nonrenewal, and therefore, there can be no judicial review on that ground; and (3) the Missouri legislature in §160.405 RSMo specifically limited charter-related decisions from review under § 536.150.1 RSMo. (KCMSD's Brief at 43-46).

KCMSD's first argument is that a nonrenewal decision is not entitled to judicial review because "[t]he statutory framework does not set forth any conditions or requirements that must be triggered before a sponsor may decline to enter or renew a charter agreement," and therefore, the nonrenewal decision did "not involve a determination of Westport's legal rights or privileges." (KCMSD's Brief at 44). Accordingly, KCMSD's decision to deny a charter proposal can be for "any reason or no reason at all" and still "not [be] subject to 'uncontested case' judicial review." (KCMSD's Brief at 44).

Second, KCMSD argues that "[t]he only other basis for judicial review under § 536.150 regards whether the agency followed required procedures in the underlying proceeding." (KCMSD's Brief at 44). KCMSD claims this is a non-issue because "there is no dispute that the School District complied with the procedural requirements for a renewal" (KCMSD's Brief at 44). Therefore, KCMSD argues that there is "no other basis for judicial review as an uncontested case." (KCMSD's Brief at 44).

Third, KCMSD alleges that the Missouri legislature removed the nonrenewal decision from the realms of an uncontested case by limiting the administrative and

judicial review available for charter school decisions under § 160.405. (KCMSD's Brief at 44-46). Because the Missouri legislature "did not provide for it [judicial review] in this scenario, plaintiff may not invoke judicial review under § 536.150.1 as an uncontested case." (KCMSD's Brief at 45). KCMSD alleges that "[b]ecause the statute does not require any particular procedures for renewal, nor does it allow for judicial review in the event of nonrenewal, the Court should construe those omissions as intentional decisions by the legislature not to provide procedural hearing rights or judicial review with regard to renewal." (KCMSD's Brief at 33). Based on these arguments, KCMSD concludes that "there are no grounds for judicial review of the School District's decision not to renew the Westport charter." (KCMSD's Brief at 45).

B. The Statutes Give the Courts the Authority to Review Decisions of Governmental Entities.

The Missouri Constitution mandates that "certain remedy [be] afforded for every injury to person, property or character." Mo. Const. art. I, § 14. The powers of government are divided into three separate parts and no one shall intrude open the province of the others. Mo. Const. art II, § 1. The authority of the Judicial branch to review actions of the government is embedded in the fabric of the American system of governance. Marbury v. Madison, 5 U.S. 137 (1803). KCMSD's argument that it may act for "any reason or no reason at all" tears at the very fabric of American government. In Missouri, judicial authority is vested in the courts, including the Circuit Courts. Mo. Const. art. V, § 1. Those Courts have an inherent power to resolve all disputes unless otherwise mandated by statute. Accordingly, "only if there is clear and convincing proof

the legislature intended to restrict access to judicial review, should review be denied."

Knapp v. Junior College Dist. of St. Louis County, Mo., 879 S.W.2d 588, 594 (Mo. App. 1994) Article V, Section 18 of the Missouri Constitution provides for judicial review of actions of administrative agencies that effect private rights. Mo. Const. art. V, § 18.

Section 536.150 of the Administrative Procedure and Review Act furthers this constitutional purpose and affords judicial review of a noncontested case when the action determines the "legal rights, duties, or privileges of any person." § 536.150.1 RSMo. Where a sponsor of a charter school determines not to renew a charter application, that determination is reviewable under § 536.150 RSMo., which provides:

1. When any *administrative* office or *body* existing under the constitution or by municipal charter or ordinance *shall have rendered a decision* which is *not subject to administrative review, determining the legal rights, duties or privileges of any person*, including the denial or revocation of a license, and there is *no other provision for judicial inquiry* into or review of such decision, *such decision may be reviewed* by suit for injunction, certiorari, mandamus, prohibition or other appropriate action, and in any such review proceeding the court may determine the facts relevant to the question whether such person at the time of such decision was subject to such legal duty, or had such right, or was entitled to such privilege, and may hear such evidence on such question as may be properly adduced, and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious

or involves as abuse of discretion; and the court shall render judgment accordingly, and may order the administrative officer or body to take such further action as it may be proper to require; but the court shall not substitute its discretion for discretion legally vested in such administrative office or body, and in cases where the granting or withholding of a privilege is committed by law to the sole discretion of such administrative officer or body, such discretion lawfully shall not be disturbed.

* * *

3. Nothing in this section shall be construed to impair any power to take summary action lawfully vested in any such administrative officer or body, or to limit the jurisdiction of any court or the scope of any remedy available in the absence of this section.

§§ 536.150.1 and 536.150.3 RSMo (emphasis added).

There are two types of cases under the Missouri administrative procedure act: "contested cases" and "noncontested cases." A "contested case" means " a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Mosley v. Members of the Civil Service Board for the City of Berkeley, 23 S.W.3d 855, 858 (Mo. App. 2000).

On the other hand, a noncontested case is one without any requirement of a formal, adversarial hearing of the type required in contested cases. Id. Generally, "an administrative decision that is *not a contested case* under MAPA *is a noncontested decision* subject to judicial review pursuant to § 536.150." Hagely v. Board of Education

of the Webster Groves School District, 841 S.W.2d 663, 669 (Mo. 1992) (rvsd. on other grounds) (emphasis added). The parties agree that if this case involves a nonrenewal, as opposed to a revocation, of the charter sponsorship, the applicable statute is §536.150 RSMo. But the parties' disagree whether this statute provides for judicial review if KCMSD's decision can be considered a noncontested case. § 160.405.3 RSMo. It does.

1. Section 536.150 Analysis

Section 536.150 provides for review of noncontested cases and can be broken down into several components: (1) the challenged determination must be by an administrative officer or body existing under the constitution or by statute or by municipal charter or ordinance; (2) that officer or body must have rendered a decision which is not subject to administrative review; (3) that decision must have determined the legal rights, duties or privileges of any person; and (4) there must be no other provision for judicial inquiry into or review of such decision. If all four prongs are met, the decision may be reviewed by the Court. § 536.150 RSMo.

The first prong of § 536.150 requires a determination by an "administrative officer or body existing under the constitution or by statute or by municipal charter or ordinance." § 536.150.1 RSMo. KCMSD does not, and cannot, dispute that they are the type of "administrative body" referred to in § 536.150. MAPA defines an "agency" as "any administrative . . . body existing under the constitution or by law and authorized by law or the constitution to make rules or to adjudicate contested cases. Mo. Stat. § 536.010(1). The appellate courts of this state have repeatedly recognized school districts as "agencies" within the meaning of the Administrative Procedure Act under Chapter

536. See Kish v. Chilhowee R-IV School District, 814 S.W.2d 649, 651-52 (Mo. App. 1991) (citing cases). KCMSD also does not dispute that they made the determination that it would not renew its sponsorship of Westport. Because KCMSD made a determination as an administrative body, the first prong of § 536.150 is met.

The second prong of § 536.150 requires that the determination is not subject to administrative review. Missouri Revised Statute § 160.405 states the rules for obtaining, renewing, and revoking a sponsorship. This statute, known by the parties as the charter school statute, states in pertinent part:

1. A person, group or organization seeking to establish a charter school shall submit the proposed charter, as provided in this section, to a sponsor. If the sponsor is not a school board, the applicant shall give a copy of its application to the school board of the district in which the charter school is to be located, when the application is filed with the proposed sponsor. The school board may file objections with the proposed sponsor, and, if a charter is granted, the school board may file objections with the state board of education

* * *

3. If a charter is approved by a sponsor, it shall be submitted to the state board of education which may, within forty-five days, disapprove the granting of the charter. The state board of education may disapprove a charter only on grounds that the application fails to meet the requirements of sections 160.400 to 160.420.

4. Any disapproval of a charter pursuant to subsection 3 of this section shall be subject to judicial review pursuant to chapter 536, RSMo.

§ 160.405 RSMo.

As discussed previously, section 4 of § 160.405 RSMo may give chapter 536 review rights. See Footnote 7. But, if the court finds that the section does not give such rights, no other provision of Chapter 160 provides for administrative review of a nonrenewal determination -- certainly the parties have not pointed to any other statute providing for such review. KCMSD even states that "Westport has *no statutory right* to further review of the agency proceeding." (KCMSD's Brief at 44-45) (emphasis added). Therefore, KCMSD seems to admit that the second prong of § 536.150 RSMo is met in that they believe the nonrenewal determination is not subject to administrative review.

The third prong requires that the decision determine the legal rights, duties or privilege of any person. The parties dispute this issue. KCMSD claims that Westport had no legal rights or privileges (but is silent as to whether it has any duties) involved in its determination. (KCMSD's Brief at 44). KCMSD's analysis also avoids other parties who are affected by the decision. While charter schools may not have a legal right to sponsorship, sponsors may have duties, but most certainly schools and students have the privilege of being sponsored. They were given that right and privilege by the General Assembly when it enacted Senate Bill 781. The teachers at charter schools have the general privilege of being affiliated with such schools and a more specific privilege of accepting employment without giving up previous contracts with other public schools. See 160.420 RSMo.

The term "privilege," as it is used in this section, is not defined by statute. In the absence of a statutory definition, the term is to be given its plain meaning as derived from the dictionary. State ex rel Hope House, Inc. v. Commissioner Merrigan, 133 S.W.3d 44, 49 (Mo. 2004). According to Black's Law Dictionary, a privilege is defined as " a particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens." Black's Law Dictionary 1197 (6th Ed. 1990). Obviously, charter schools, and its teachers and students, have "enjoyed the benefit" of the charter school system, a privilege which cannot be exercised if sponsorship is not obtained. Furthermore, this privilege is not available to the public at large as charter schools are limited to a geographic area and have certain other requirements. Because a nonrenewal decision takes away, at a minimum, a charter school's privilege, the second prong requiring determination of a right, duty or privilege is met.

Lastly, the fourth prong requires that there is no other provision for judicial inquiry into or review of such decision. KCMSD agrees that there is no other provision for judicial inquiry. (KCMSD's Brief at 33). KCMSD states that the charter school statute "does not require any particular procedures for renewal, nor does it allow for judicial review in the event of nonrenewal." (KCMSD's Brief at 33). In fact, KCMSD uses the "omission" of a provision for judicial inquiry as a basis to argue that the noncontested case statute does not apply. This argument clearly flies in the face of the plain language of § 536.150 RSMo, where this "omission" is required to obtain judicial

review. Because there is no provision for judicial inquiry, KCMSD's decision not to renew Westport's charter meets the fourth prong of the noncontested case statute.

Because an agency's decision not to renew a sponsorship meets all four of the requirements necessary to obtain judicial review of an agency decision, KCMSD's nonrenewal of Westport's sponsorship unquestionably falls within the perimeters of § 536.150 RSMo, and accordingly, the Court may review KCMSD's nonrenewal decision.

2. KCMSD Misinterprets Section 536.150.

KCMSD does not contest that some of its decisions are subject to § 536.150 RSMo under certain circumstances. Instead, KCMSD argues that the "underlying proceeding did not involve determination of Westport's legal rights or privileges" and that "there is no dispute on whether the School District complied with the procedural requirements for renewal" either of which is necessary to invoke the Court's jurisdiction under § 536.150. See KCMSD's Brief at 44.

KCMSD's argument is void of analysis of why the nonrenewal decision did not involve a determination of Westport's rights, privileges, or duties besides making an "I can do what I want to" argument. As shown above, charter schools, students, parents and teachers have been granted the privilege of charter schools, a privilege which is directly effected by denial or non-renewal of sponsorship. Without sponsorship, the charter schools cannot operate.

KCMSD's second argument that "[t]he only other basis for judicial review under § 536.150 regards whether the agency followed required procedures in the underlying proceeding" is difficult to follow. KCMSD argues that "because there is no dispute that

the School District complied with the procedural requirements for a renewal in that it treated the renewal as an initial charter application, and provided notice of its decision within 60 days, there is no other basis for judicial review as an uncontested case." (KCMSD's Brief at 44). As recognized by KCMSD, there seems to only be two instances provided in § 160.405 RSMo where judicial review is specifically provided for: (1) Section 160.405.3 where the State Board of Education disapproves of a charter after it is approved by a sponsor or where a sponsor decides not to provide sponsorship of a charter⁷ and (2) where a charter is revoked for cause before the expiration of its term. Certainly, the first situation is not what is referenced by KCMSD in its argument as KCMSD is a distinct entity from the State Board of Education and KCMSD has made no argument concerning Section 3's application to a sponsor. The second situation providing for judicial review where a charter is revoked is, in fact, a *disputed* issue for the parties from review of the pleadings. (KCMSD's Brief at 33-34; Plaintiff's Brief at 15-16, 25, 28.) Therefore, KCMSD's second argument against the noncontested case statute's application in this case is meaningless.

KCMSD's final argument against the application of § 536.150 is that the "Missouri legislature specifically limited administrative and judicial review regarding charter school decisions in § 160.405, thereby removing this from uncontested review under §

⁷ KCMSD only argues that § 160.405 RSMo grants review of the Board's disapproval of a charter, and not a sponsor's decision not to sponsor a charter school.

536.150.1." (KCMSD's Brief at 44). KCMSD follows that "[b]ecause the Missouri legislature specifically limited judicial review and did not provide for it in this scenario, plaintiff may not invoke judicial review under § 536.150.1 as an uncontested case." (KCMSD's Brief at 45). However, what KCMSD's argument fails to take into account is that the § 536.150.1 *requires* that "there is no other provision for judicial inquiry into or review of such decision." Therefore, KCMSD's argument that "the Court should construe those omissions as intentional decisions by the legislature not to provide procedural hearing rights or judicial review with regard to renewal" is meritless. (KCMSD's Brief at 33). Judicial review should only be denied where there is "clear and convincing proof" from the legislature to the contrary. Knapp, 879 S.W.2d at 594.

If all administrative statutes that failed to state a provision for administrative or judicial review should be construed as intentional acts to prohibit a party from obtaining judicial process, n§ 536.150 would be completely unnecessary. Section 536.150 unquestionably requires that there be *'no other provision for judicial inquiry into or review of such decision [by the agency].'* § 536.150.1 RSMo (emphasis added). Statutes should never be construed in a manner which renders their terms meaningless. Wollard v. Kansas City, 831 S.W.2d 200, 203 (Mo. 1992). KCMSD's argument does just that. Section § 536.150 is intended to give persons judicial review for these 'honcontested' cases, and KCMSD's argument to the contrary goes against the plain language of the statute. See also Farm Bureau Town & Country Ins. Co. v. Angoff, 909 S.W.2d 348 (Mo. 1995) (recognizing that where there is no administrative remedy available for an

agency's actions that are unlawful or unconstitutional, judicial review is the only means for an aggrieved party to seek relief).

C. Missouri Case Law supports the Jurisdiction of the Trial Court in This Case

Missouri case law supports the finding that non-renewal decisions are "noncontested" cases subject to judicial review under § 536.150 RSMo. See Missouri National Education Ass'n v. Missouri State Bd. of Educ., 34 S.W.3d 266, 280 (Mo. App. 2000) (finding that statutory grant of discretion to grant exemptions to school districts "is not unbridled and is subject to judicial review under section 536.150"); Barry Serv. Agency Co. v. Manning, 891 S.W.2d 882, 887 n.6 (Mo. App. 1995) (ruling that Director of Division of Finance's decision that proposed rate on unsecured loans was a "noncontested case"); State ex rel Valentine v. Bd. of Policy Commissioners, 813 S.W.2d 995 (Mo. App. 1991) (holding that Commissioners denial of claimants disability retirement benefits was a noncontested case subject to judicial review).

The classification of a case as contested or noncontested is not left to the discretion of the agency but is to be determined as a matter of law. Board of Police Commissioners of Kansas City, 813 S.W.2d at 957. The hearing requirement is the key to the classification of contested and noncontested cases, and the requirement must be found in a constitutional provision, statute, municipal charter or ordinance. Id. KCMSD's brief is void of any reference to constitutional provisions, statutes or municipal ordinances which prescribe an administrative hearing to determine whether a non-

renewal was appropriate under the circumstances. This absence indicates that the case is properly classified as a noncontested case. See id.

**D. Equity and Principles of Government Oversight Support the Trial Court's
Exercise of Jurisdiction**

Finally, equity requires that this Court find that non-renewal decisions are subject to non-contested case judicial review. Equity abhors forfeiture and the Missouri Constitution guarantees remedy for injury. Mo. Const. art. I, § 14; State of Inf. of McKittrick v. American Ins. Co., 173 S.W.2d 519 (Mo. 1943). "[O]nly if there is clear and convincing proof the legislature intended to restrict access to judicial review, should review be denied." Knapp, 879 S.W.2d at 594 KCMSD offers no more than mere conclusory statements in support of its arguments that the legislature intended to restrict access to judicial review for non-renewals. This certainly does not rise to the "clear and convincing proof" this Court does and should require.

Private parties have the right to contract as they see fit. But the KCMSD is a government entity. It must take actions, even those that involve the exercise of discretion, in a manner that is lawful. Government entities may not engage in arbitrary, capricious and illegal actions and the courts have jurisdiction to hear claims that government entities have done so. In this case, the trial court exercised its jurisdiction properly. It may well turn out that KCMSD's actions were not arbitrary, capricious or unlawful, but that issue is one for appeal and does not deprive the trial court of jurisdiction.

CONCLUSION

For the foregoing reasons, Amicus Curiae Association of Quality Charter Schools respectfully urges this Court to deny the writ. As pointed out in Respondent's brief, KCMSD has the right to appeal decisions of the Courts. Granting the writ – and holding that the courts do not have power to review decisions about charter school sponsorship – is contrary to the law and sets a dangerous precedent for future judicial review. If Judge Williamson's decision below was incorrect, it can be remedied on appeal. KCMSD's request for a writ is an inappropriate restriction of judicial authority.

Respectfully Submitted,

STINSON MORRISON HECKER, LLP

By: _____
Charles W. Hatfield Mo. Bar #40363
STINSON MORRISON HECKER, LLP
230 W. McCarty St.
Jefferson City, MO 65101
Telephone: (573) 636-6263
Facsimile: (573) 636-6231

Jennifer J. Coleman Mo. Bar #52426
1201 Walnut, Suite 2800
Kansas City, Missouri 64106-2150
Telephone: (816) 842-8600
Facsimile: (816) 691-3495

Attorneys for Amicus Curiae
Association of Quality Charter Schools

CERTIFICATE PURSUANT TO RULE 84.06(c) AND (g)

I, Charles W. Hatfield, hereby depose and state as follows:

1. I am an attorney for Amicus Curiae Association of Quality Charter Schools.
 2. I certify that the foregoing Brief of Amicus Curiae Association of Quality Charter Schools contains 5,428 words and 537 lines (including footnotes) and thereby complies with the word and line limitations contained in Missouri Rule of Civil Procedure 84.06(b).
 3. In preparing this Certificate, I relied upon the word count function of the Microsoft Word '97 word processing software.
 4. I further certify that the accompanying floppy disk containing a copy of the foregoing Brief of Amicus Curiae has been scanned for viruses and is virus-free.
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2004, two copies of the foregoing document was sent by United States Mail, postage prepaid, to:

Allan V. Hallquist
Hayley E. Hanson
Kirsten A. Byrd
Blackwell Sanders Peper Martin LLP
1000 Two Pershing Square, 2300 Main Street
Kansas City, Missouri 64108
Tel: (816) 983-8000
Fax: (816) 983-8080

Attorneys for Relators

James R. Wyrsh
Stephen G. Mirakian
Keith E. Drill
1001 Walnut, Suite 1300
Kansas City, Missouri 64106
Tel: (816) 221-0080
Fax: (816) 221-3280

Attorneys for Plaintiff

The Honorable J.D. Williamson, Jr.
Division 11
Circuit Court of Jackson County at Kansas City
Jackson County Courthouse
415 East 12th Street
Kansas City, Missouri 64108

Respondent

Attorney for Amicus Curiae